AWARD NO. 24
NMB CASE NO. 24

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

and

MidSouth Rail Corporation (Kansas City Southern Rwy)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer George Tompkins for the removal of the (30) days discipline, 5 days actual and 25 record and the payment of 5 days plus 1 attending the investigation in connection with the alleged violation of ABTH Rules 104.1 and 104.3.3 item 4, which was assessed on June 17, 2009.

OPINION OF BOARD:

At the time of the incident leading to Claimant's discipline (May 10, 2009) he was assigned as an Engineer on Train RJA321-09, and was on a crew switching cars on the lead at Jackson Terminal. At or about 3:43 a.m., Claimant was instructed to kick a car, and responded to the instruction in the affirmative. In the process, a knuckle on one of the cars broke. As a consequence of this event, Claimant was notified to appear for a formal investigation into the matter. The formal investigation was held on June 3, 2009. Following that investigation, Claimant was notified, by letter of June 17, 2009, that he had been found guilty as charged and was assessed a thirty (30) day suspension with five (5) days to be served as actual time off and twenty-five (25) days record suspension which

would be recorded in his personnel file as an actual suspension.

The Organization filed a claim protesting Claimant's discipline on July 13, 2009. The Carrier denied that claim on September 4, 2009. The claim was then progressed in accordance with the Parties' Agreement, including conference on the property, after which time it remained unresolved. Thus, it is properly before the Board for resolution.

The Carrier contends that Claimant failed to handle the automatic and independent brakes properly on the specific move in question. As a result, the Carrier alleges, he caused severe strain on the cars still attached to his locomotive causing one of the knuckles on those cars to brake. It maintains that sufficient evidence was presented on the record to support the finding of guilt and the discipline was fair and warranted. It disputes the Organization's assertion that the Carrier's failure to call the other two crewmembers as witnesses is a fatal procedural flaw in this case, and maintains that they could not have had material knowledge of the incident, because Claimant was solely responsible for running his locomotive.

At the outset, the Organization has protested that Carrier's failure to call the other two crewmembers as witnesses deprive Claimant of a fair investigation. In support of their position on this point the Organization cites First Division Award No. 14729 (Douglas), in which the Board held, in part, "all witnesses to an incident in question whose testimony can throw light on the matter should be called." Beyond that argument, the Organization insists that responsibility for the incident lies with the entire crew, not just the engineer, and he

should not have been singled out for blame regarding the broken knuckle. Moreover, the Organization notes that at the hearing Claimant's representative presented a memorandum that recognized the problems with handling more than 40 cars and cuts exceeding 5000 tons at one time. Thus, the Organization protests that by the Carrier's own determination, conditions outside of Claimant's control led to the braking of the knuckle.

The Board has read carefully the transcript of the investigation in this case, and the evidence presented on the record. With respect to the Organization's protest regarding the absence of witnesses at the investigation, we are inclined to agree with the Carrier that, in this particular instance, it is unlikely that they would have had evidence pertinent to the actual running of the locomotive. However, Carrier makes such determinations at its peril, and would do best to err on the side of inclusion, rather than exclusion in such cases. (See, for example, PLB 3623, Award No. 4 (Eischen)).

With respect to the merits of the case, a careful reading of the transcript indicates that there were some risks inherent in making the switches Claimant was ordered to make. This fact is confirmed by Carrier's Trainmaster Notice 051109 (issued on the day after the incident dealt with in this case):

> Due to recent events effective immediately the east switchers can no longer handle more than 40 cars, cuts not to exceed 5,000 tons at one time. All this means smaller cuts to help "reduce the risk" of any further incidents. (Emphasis in original)

There is insufficient evidence on this record to suggest that Claimant was sufficiently

negligent to warrant the severity of discipline assessed. Given the circumstances surrounding his switching task, an argument can be made that Claimant might have been more scrupulous in requiring his crew to make checks that there was sufficient air to handle the cut (Tr.p.6), but without the presence of the crew at the hearing and in light of the May 11, 2009 Trainmaster's notice there is certainly not enough evidence to justify the quantum of discipline assessed. Accordingly, the discipline shall be reduced to a five (5) day record suspension and Claimant shall be reimbursed for moneys lost as a result of the five (5) day actual suspension. Within thirty (30) days of receiving this award, the Parties shall make a joint search of Carrier's record to determine the amount of back pay due Claimant.

AWARD

Claim sustained to the extent set forth in the foregoing Opinion.

Elizabeth C. Wesman

Elizabeth C. Wesman, Chairman

Organization Member

Carrier Member

Dated 7/27/10